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No. 06-1648

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IN THE

Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.,

Petitioners,

v.

SOGECABLE, S.A.; CANALSATÉLITE DIGITAL, S.L.,

Respondents.

On Petition Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Respondents allege two RICO enterprises – a "Technology Enterprise" and a "Distribution Enterprise." Petitioners challenge only the former. The questions presented are:

> (a) Whether the Technology Enterprise, which involves parent and subsidiary corporations from different countries allegedly playing distinct roles, in association in fact with a separate group of computer hackers and pirates, is distinct from the RICO "person," which the complaint alleges is the parent corporation.
>
> (b) Whether the Technology Enterprise alleged in the complaint can qualify as a RICO "enterprise" separate and distinct from the alleged pattern of racketeering activity because, *inter alia*, the enterprise had purposes and functions other than the pursuit of the criminal activities, and the participants in the enterprise had assigned roles, dictated in hierarchical manner by the RICO person.

2. Whether summary reversal is required on statute of limitations grounds because the circuit panel purportedly misapplied a rule governing accrual of claims, when in fact the panel applied equitable principles to toll the limitations periods based on allegations in the complaint of both active concealment by Petitioners and reasonable diligence by Respondents to discover the identity of the tortfeasors.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Sogecable, S.A. is a publicly-traded corporation. The following publicly-held corporations each owns more than 10% of Sogecable, S.A.'s stock: Telefónica, S.A., and Promotora de Informaciones, S.A. (also known as Grupo PRISA).

Sogecable, S.A. owns more than 10% of Respondent CanalSatélite Digital, S.L., a corporation.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioners' effort to convince this Court to accept this case contrasts with their belittling the Ninth Circuit memorandum decision in related litigation: "[T]he unpublished *Sogecable* disposition did not alter Ninth Circuit law. Indeed, [plaintiff in this related case] cannot even properly cite [the disposition]."[1] If the Ninth Circuit's memorandum decision heralded no change in the circuit's law and, under Ninth Circuit Rule 36-3(c), future litigants cannot even cite it within the circuit, then the decision can hardly be worthy of this Court's attention.

Underscoring the lack of importance of this case is Petitioners' concession, Pet. 7 n.2, that they challenge only one of the two RICO enterprises alleged by Respondents. In other words, even if Petitioners prevailed, it would not dispose of the RICO count and the district court would still have to adjudicate the claim on remand, rendering a trip to this Court a largely academic exercise.

Perhaps cognizant of those problems, Petitioners devote nearly all their attention to chronicling two purported circuit splits. But they do so without tying those supposed splits to the case at hand. Petitioners first insist that a split exists on whether a parent together with a subsidiary or agent can constitute a RICO "enterprise." Closer inspection of the authority featured by Petitioners reveals that the circuits agree that separate and distinct corporate subsidiaries and/or agents can be part of a RICO enterprise that includes a parent corporation. Respondents' allegations of the distinctions

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[1] NDS' Memo. in Opp. to Pl.'s Mtn for Reconsid. of Prev. Order Dismissing Claims at 4, *Echostar Satellite Corp v. NDS Group PLC*, No. SA CV 03-950 DOC(JTL) (C.D. Cal. 2007). This Court may take judicial notice of other filings in federal court by Petitioners.

between the various entities comprising the enterprise and the RICO person satisfy the tests prevailing in all circuits.

Petitioners' second RICO question fares no better. The question was not addressed by either of the lower courts in this case – and for good reason. Even assuming a debate over the separate "structure" requirement, the allegations of Respondents' complaint readily satisfy all prevailing formulations of the requirement. Unlike an "informal group" that may not pass muster in some courts' eyes, the complaint here alleges a structure separate from the conduct of criminal activity. The enterprise pursued both legitimate and criminal ends, and was a highly organized and effective association-in-fact. Under the tests controlling in the circuits that Petitioners depict as contrary to the test in the Ninth, such allegations are sufficient.

Finally, Petitioners insist that this Court should summarily reverse the Ninth Circuit's judgment on a question about the statute of limitations. Petitioners neglect to reveal in their Petition, however, that the Ninth Circuit's decision on the statute of limitations turned on equitable doctrines – not on the accrual question addressed in the Petition. By confusing those two issues, Petitioners invite review of a question not even presented by the circuit's decision. Moreover, the Petition, if granted, would result in this Court's review of state law statute of limitations issues, and require an evaluation of whether factual allegations warrant equitable tolling on such state law claims. Such matters do not beckon this Court's scrutiny.

The Petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

Petitioners NDS Group PLC ("NDS") and NDS Americas, Inc. ("NDSA") provide security services and technology to satellite television providers, ensuring that only paid subscribers can view the encrypted programs.

Respondents Sogecable, S.A. and CanalSatélite Digital, S.L., which are satellite television providers, licensed similar security technology from a competitor of Petitioners.

To gain a competitive advantage, NDS hacked its competitors' security systems, including those licensed by Respondents. The plan ultimately evolved into creating and distributing software and hardware that would allow a licensee's current and potential customers to illegally pirate its encrypted television programs.

NDS organized two ventures to execute its scheme. To hack the security technology, NDS set up a high-tech laboratory and research facility in Haifa, Israel. This laboratory was staffed by a team of experienced hackers and pirates, ostensibly charged with researching NDS' own vulnerabilities, but secretly used to hack and sabotage its competitors' technologies. Two accomplished hackers, Christopher Tarnovsky and Oliver Kommerling, led the so-called "Haifa Team." The Ninth Circuit described them as "individuals who appear to be independent contractors . . . hired to hack the encryption code." Pet. App. 5a.

The Haifa Team successfully hacked NDS' competitors' security systems over a period of years. This was no simple exercise, requiring the electrical and optical examination of encrypted software that its owners had devoted substantial resources to protect. The venture, comprised of NDS, its U.S subsidiary and the Haifa Team, including the specially engaged hackers, was an association-in-fact enterprise referred to below as the "Technology Enterprise."

The second enterprise alleged was the "Distribution Enterprise." NDS transferred the hacked code – that is, the fruits of the Technology Enterprise – to Mr. Tarnovsky, who was based in Los Angeles with NDSA, and directed Mr. Tarnovsky to create and distribute software and hardware that would allow customers to illegally pirate satellite television using the hacked code. NDS directed NDSA to transmit the hacked code, through Mr. Tarnovsky, to Alan Menard, in

Canada, who posted it on his website, www.dr7.com. That website served as a clearinghouse for hackers and pirates on methods to steal encrypted satellite signals.

Mr. Menard sat in a unique position to widely distribute the code and software through his website while concealing the source of the hacked code to the outside world. NDS also directed Messrs. Tarnovsky, Menard and others to help develop, manufacture, or distribute devices that consumers could use to circumvent its competitors' security systems. The distribution efforts inflicted substantial harm upon Respondents.

The Petition challenges the legal sufficiency of the Technology Enterprise only.

B. Summary of the Proceedings Below

Petitioners' efforts succeeded not only in accomplishing the desired results, but also in concealing their involvement in the affair. Indeed, the enterprises alleged by Respondents were designed by NDS to prevent others from tracing counterfeit access cards detected in the marketplace back to their true source, NDS and the operations of the two enterprises that it had created and directed. After Respondents discovered Petitioners' complicity, they sued Petitioners for violating federal and state laws, along with a count for violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The complaint identifies NDS as the sole RICO "person," and it alleges the two separate "enterprises" – the Technology Enterprise and the Distribution Enterprise – described above.

The district court dismissed Respondents' state law and federal, non-RICO claims because it refused to equitably toll the limitations periods applicable to them. It also dismissed the RICO claims, finding that: (a) Respondents had not alleged sufficient control by the RICO person, NDS, over the Distribution Enterprise to state a RICO claim; and (b) the Technology Enterprise claim was improper because it was

"nothing more than a subset" of NDS. Pet. App. 25a-28a. These findings were largely dependent on the district court's conclusion that Respondents' first and second amended complaints were contradictory, and that the earlier complaint should control.

The Ninth Circuit reversed in an unpublished and non-precedential opinion. First, it equitably tolled the statute of limitations because Respondents "were diligent until they learned [Petitioners'] identities." Pet. App. 3a. Second, it held that both of the RICO enterprises were viable, finding that (a) Respondents had sufficiently pled NDS' control over the Distribution Enterprise; and (b) NDS was sufficiently distinct from the Technology Enterprise since "the enterprise consisted of two separate corporations—one existing under the laws of the United Kingdom [NDS] and one existing under the laws of the State of Delaware [NDSA]—and individuals who appear to be independent contractors (the Haifa Team) hired to hack the encryption code." Pet. App. 4a-5a. Unlike the district court, the Ninth Circuit viewed the allegations in the light most favorable to Respondents and considered the facts alleged in the later complaint (after deeming the two complaints harmonious). *See* Pet. App. 4a-5a.

Petitioners misstate the holding of the Ninth Circuit regarding the statute of limitations issue, claiming that it held that "the statute of limitations period begins only when the identity of the alleged injurer is discovered, rather than when the injury is discovered." Pet. at 4. In so doing, Petitioners conflate the accrual of claims with the separate doctrine of equitable tolling. The Ninth Circuit held that "under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reasonable diligence could not know, *who* caused the harm that is the subject of the complaint." Pet. App. 2a-3a. Respondents' allegations in their complaint about Petitioners' efforts to conceal the scheme, along with Respondents' diligence to uncover it, convinced the Ninth Circuit that equitable tolling

was warranted. Petitioners do not discuss equitable tolling at all in their Petition.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Squarely Present The RICO Questions Raised by the Petition

At the same time that Petitioners invite review over two RICO questions, they acknowledge that the answers to these questions will not be dispositive of the RICO count in this case. Pet. at 7 n.2. Respondents presented two RICO enterprises, but Petitioners challenge only one. Even leaving aside that concession, neither of the issues presented in this case warrant review in their own right. Both issues implicate factual allegations that, if accepted as true, would satisfy the tests on all sides of the alleged circuit splits.

A. The Technology Enterprise Is Distinct From the RICO Person

The Ninth Circuit held that the RICO person alleged by Respondents is distinct from the Technology Enterprise because the enterprise consisted of the RICO person and two entities distinct from the RICO person. This case does not present a parent corporation and a largely indistinguishable subsidiary as the RICO enterprise, where the subsidiary is a mere instrumentality of the parent, with no distinct business activities or purpose; rather, NDS and NDSA are very different corporations, both in purpose and operations. NDS, a U.K. company with broad experience in developing technology, controlled and directed the Technology Enterprise. NDSA, a U.S. company concerned with sales and customer support, provided links with the Distribution Enterprise and an American base for Mr. Tarnovsky to direct both the Technology and Distribution Enterprises.

The Haifa Team, however, is equally important to the distinctiveness issue. It encompassed "individuals who appear to be independent contractors . . . hired to hack the encryption code." Pet. App. 5a. The district court was

reversed largely because it treated the Haifa Team as a normal and ordinary part of NDS' business. Viewed in a light appropriate for a motion to dismiss, however, the Haifa Team is a unique and separate but organized group distinct from NDS under the law of every circuit and under the underlying rationale of *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The Ninth Circuit accordingly had no occasion to dwell on potential disagreements among the circuits when the Technology Enterprise here would satisfy any of the tests.

Petitioners' authorities – nearly all of which predate this Court's decision in *Cedric Kushner* – confirm that the Technology Enterprise is sufficiently distinct from NDS under the law of all circuits. Petitioners tout their first case, *Gasoline Sales v. Aero Oil Co.*, 39 F.3d 70 (3d Cir. 1994), as an example of a case that "applies a bright-line rule." Pet. at 16. *Gasoline Sales* relies upon the general rule that "the actions of a corporation's agents in conducting its normal affairs are constructively its own actions for section 1962(c) purposes." *Id.* at 73. Yet, recognizing that a corporation could never be a RICO defendant if "agents" were broadly construed, the court explained that even a subsidiary corporation (not to mention an "agent") can be sufficiently different from the parent if it has a "distinctive and separate role." *Id.* at 73-74.

The relationship (and separateness) among NDS, NDSA, and the Haifa Team is a far cry from *Gasoline Sales*, where the parent and its subsidiaries were virtually indistinguishable. *See also Emcore Corp. v. PricewaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 261 (D.N.J. 2000) ("[T]his court agrees that the conception that a corporation must always act through its agents has become outdated by Third Circuit analysis . . . a corporation can be a RICO defendant, so long as the corporation's actions are separable from those of its agents."). Mr. Tarnovsky and the Haifa Team are quintessentially "distinctive and separate" actors. *Cedric Kushner*, 533 U.S. at 166 (endorsing approach

under RICO that "the corporation and its employees are not legally identical").

This crucial distinction between the creation of a covert and separate group of operatives engaged for a series of highly specialized and illegal acts and the use of an indistinguishable subsidiary to perform standard business tasks distinguishes this case from all of the other cases featured by Petitioners to establish their "split." For example, *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 155 (5th Cir. 1997), turned on the finding that plaintiff "did not plead any distinct roles for the subsidiary." Far from applying a "bright-line rule" as suggested by Petitioners, the Fifth Circuit appreciated that a plaintiff could "plead . . . distinct roles for the subsidiary . . . and the parent corporation" in order to bestow them with the necessary "distinctiveness." *Id.* at 155-56. The Fifth Circuit subsequently appreciated that the distinctiveness requirement could also be satisfied when the enterprise acted outside the normal course of business. *See Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 230 (5th Cir. 2003) (focusing on the fact that "the predicate acts . . . such as mailing false production reports, were committed . . . in the ordinary course of business"). The Ninth Circuit hardly needed to disagree with *Khurana* or *Whelan* to find that the Haifa Team was "distinct" from NDS or performed a unique function, and that the same holds true for NDSA.

In *United States v. Computer Sci. Corp.*, 689 F.2d 1181 (4th Cir. 1982), the court found that a corporate division (not even a separate legal entity), alleged as the entire RICO enterprise, was insufficiently distinct from the corporation, the RICO person. There was no allegation that this division was somehow distinct from the corporation or performed any unique function. In *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), the alleged enterprise was merely a holding company. Again, there was no allegation that the "bank holding company" played even the smallest role in the scheme run by the corporation, the RICO person. *Id.*

Cases from the Seventh Circuit rely on similar principles. *Fitzgerald v. Chrysler Corp.*, 116 F.3d at 225 (7th Cir. 1997), dealt with a claim that Chrysler and its dealers were a RICO enterprise. But the Seventh Circuit appreciated that the dealers played no material role in the scheme because Chrysler dealt "with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is *entirely incidental*." *Id.* at 227-28 (emphasis added). The dealers were "merely a conduit" with nothing but an "incidental role in the alleged fraud." *Id.* The other Seventh Circuit cases cited by Petitioners, *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), and *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930 (7th Cir. 1999), were not even faced with the question of an indistinct subsidiary (let alone anything like the Haifa Team). In *Baker*, the enterprise did not have a common purpose and the RICO person had not created or manipulated any other distinct entity. *Baker*, 357 F.3d at 691. In *Bachman*, the plaintiff's claims failed to allege organization or control of the enterprise. *Bachman*, 178 F.3d at 932.

Petitioners' cases from the First, Second, Eighth, and Tenth Circuits do not part company with the other circuits. *See, e.g., Bessette v. Avco Fin. Servs.*, 230 F.3d 439, 449 (1st Cir. 2000); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Fogie v. THORN Ams., Inc.*, 190 F.3d 889 (8th Cir. 1999); *Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 885-86 (10th Cir. 1992).

Several of those cases actually rely upon authority that Petitioners present as in conflict. *See Bessette*, 230 F.3d at 449 (agreeing with Seventh Circuit); *Riverwoods*, 30 F.3d at 344 (citing Third, Fourth, and Fifth Circuit authority). Similar to the other circuits, those cases require some minimal showing of distinctiveness for the subsidiary or the agent – such as allegations that the subsidiary or agent was not merely an extension of the parent or simply conducting the parent's regular business affairs. Nor do Petitioners cases allegedly

holding that a subsidiary or agent "always" constitutes an enterprise hold to the contrary. *See, e.g., Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) ("[T]here is no question that law firms retained by DuPont are distinctive entities."); *Davis v. The Mutual Ins. Co. of N.Y.*, 6 F.3d 367, 377 (6th Cir. 1993) ("The record is replete with evidence from which the jury could reasonably conclude that FIA was a distinctive entity. . .").

There is no conflict among the circuits and the holding of the Ninth Circuit in this case given the allegations of Respondents' complaint. And certainly none of these cases find that "independent contractors," as the Ninth Circuit described the Haifa Team, are insufficiently distinct from a corporation to comprise part of a RICO enterprise.

In fact, any differences in the various articulations of "enterprise" are more semantics than substance. Regardless, Respondents allege sufficient distinctiveness in the enterprise to satisfy the test in any circuit. The Technology Enterprise is what the Seventh Circuit would describe as the prototypical RICO enterprise, where a "previously legitimate" "firm's resources, contacts, facilities, and appearance of legitimacy" are used "to perpetrate more, and less easily discovered, criminal acts." *Fitzgerald*, 116 F.3d at 227. NDS exploited its ability to utilize a separate and distinct unit made up of expert hackers and known criminals, supply them with expensive equipment and facilities, and then compartmentalize the unit and other aspects of the enterprise, all to avoid discovery. *See id.* at 227-28. There is no question that Respondents allege an enterprise distinct from the RICO "person."

Respondents' allegations on the Technology Enterprise more than meet the distinctiveness requirements under all the circuit formulations to which the Petition directs attention. This case is therefore inappropriate for resolving whatever circuit split may exist on that issue.

B. The Ninth Circuit's Decision Does Not Present the Question of Whether A RICO Enterprise Must Have a Structure Separate from the Alleged Pattern of Racketeering Activity

Petitioners do not even attempt to argue that this case implicates the purported "separate structure" split. For all of their discussion of the split, they fail to explain why it matters in the context of this case. It does not. Indeed, neither of the lower courts addressed this question.[2]

That may be because the allegations in the complaint are plain: "Those enterprises existed and exist as an on-going entity *separate and apart from the pattern of racketeering activity*, including the conspiratorial racketeering, in which the enterprises engaged and/or by which the enterprises were operated." Sec. Am. Compl. ¶ 167 (emphasis added). Petitioners even vouch for the separateness between the Technology Enterprise itself and the racketeering pattern by suggesting legitimate purposes and functions for the enterprise, such as scrutinizing NDS' own technology for possible security gaps. Pet. at 5-6. And they acknowledge that the circuits with whom they agree simply require "an allegation that the enterprise has a structure that exists apart from the pattern of racketeering activity." Pet. at 21. The Petition neglects to explain how the allegation in paragraph 167, among others, fails that test.

Beyond those points, the complaint adequately alleges a structure for the Technology Enterprise apart from the criminal activity. NDS organized and managed each member of the Technology Enterprise, including NDSA, Mr. Tarnovsky (who was given an American situs at NDSA), Mr.

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[2] Petitioners intimate that the district court actually reached this question, but this suggestion conflicts with their brief to the Ninth Circuit, where, at page 45, they maintain that this issue was "not reached by the district court."

Kommerling, and the Haifa Team, to ensure that the enterprise functioned cohesively and contributed to the larger plan. This enterprise was structured to be useful to both NDS' legitimate businesses interests and its criminal endeavors, and operated from at least 1996 until 1999.

Thus, the Technology Enterprise was used both to research the vulnerabilities of NDS' own technology and to secretly and illegally hack and sabotage that of its competitors' over a period of years. This highly organized and competent enterprise certainly meets the requirement in Petitioners' lead case, *United States v. Bledsoe*, 674 F.2d 647, 663 (8th Cir. 1982), that "the enterprise must be more than an informal group created to perpetrate the acts of racketeering." Likewise, it satisfies the test in *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir. 1983), that an enterprise must have "an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement."

The balance of Petitioners' authority is in similar vein. *See, e.g., Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 645 (7th Cir. 1995) ("there need not be much structure, but the enterprise must have some continuity and some differentiation of the roles within it"); *United States v. Sanders*, 928 F.2d 940, 943 (10th Cir. 1991) (relying on the test in *Riccobene*). As a result, this Court's decision on whether or not a separate structure is needed would not affect the outcome of this case.

C. This Case Is a Poor Vehicle for Certiorari

Several factors render this case ill-suited for review by this Court. The RICO count featured in the Petition is not case-dispositive, and further proceedings and record development will be required on the other federal and state law causes of action. That the case sits at the pleading stage

without the benefit of discovery (and, indeed, when many participants in the scheme and their roles remain unknown to Respondents) counsels against certiorari. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916) (recognizing that certiorari is generally unwise when the facts of the case are not settled).

And even if Petitioners prevailed on the RICO questions presented, that would not spell the demise of Respondents' RICO claim. Petitioners admit that "Sogecable also alleged a 'distribution enterprise,' but the allegations there *do not implicate the questions presented by this petition.*" Pet. 7 n.2 (emphasis added). Because the complaint presents two separate RICO enterprises, challenging only one ensures that Petitioners will face a RICO claim even if the other enterprise were deemed insufficient. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.").

As noted above, moreover, the Ninth Circuit's ruling was an unpublished disposition, which Ninth Circuit rules prohibit parties from citing. 9th Cir. R. 36-3(c). This explains why Petitioners were able to convince the same district court in another case to disregard the Ninth Circuit's decision in this case.[3] Petitioners cannot have it both ways – dismissing the decision as irrelevant in one forum but proclaiming it as a case of national importance before this Tribunal.

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[3] Order Granting Pl.'s Mtn for Reconsideration at 5, Doc. #403, *Echostar Satellite Corp v. NDS Group PLC*, No. SA CV 03-950 DOC(JTL) (C.D. Cal. 2007) (agreeing with NDS that *Sogecable* disposition "is not precedent and thus, does not change circuit law").

II. As Petitioners Admitted at Oral Argument, the Statute of Limitations Is Equitably Tolled Where a Plaintiff Could Not Know, Despite Reasonable Diligence, Who Caused the Injury

Petitioners claim that the Ninth Circuit held that state and federal statutes of limitations begin only when the plaintiff discovers the identity of the defendant. Pet. at 4, 24. This is a misstatement. Petitioners confuse the accrual of a claim, which begins the statute of limitations, and the tolling of the limitations period, which suspends it. The Ninth Circuit invoked equitable tolling to suspend the limitations period, rather than find that the claim had not accrued: "Because--on the facts as pleaded--Plaintiffs were diligent until they learned Defendants' identities, the period of time before March 12, 2002, is equitably tolled and added to the end of the limitations period." Pet. App. 3a.

Because Petitioners attack the wrong legal theory, the cases they cite, such as *United States v. Kubrick*, 444 U.S. 111 (1979), are inapposite. *Kubrick* rejected the argument that accrual does not begin until the plaintiff "receives or perhaps forms for himself a reasonable opinion that he has been wronged . . . [because] if a claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused his injury was legally blameworthy." *Id.* at 118. This Court held that accrual did not wait on legal advice, but that a claim accrues once a plaintiff knows of his injury and its cause. It did not address equitable tolling.

The Ninth Circuit's decision has nothing to do with *Kubrick*. The circuit held that "under both federal and California law, equitable tolling protects a plaintiff who does not know, and even exercising reasonable diligence could not know, *who* caused the harm that is the subject of the complaint." Pet. App. 2a-3a. Petitioners' challenge here to this holding and their request for summary reversal are

especially strange because their counsel *admitted* during oral argument that this was a correct statement of law. *Id.* at 2a.

The ruling below is unexceptional. It has long been accepted that "[t]ime requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'" *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *see also Rotella v. Wood*, 528 U.S. 549, 560-561 (2000) ("[W]e do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling . . . and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty."). The Ninth Circuit correctly applied equitable tolling to Respondents' claims given the great pains Petitioners took to conceal their responsibility and given that Respondents exercised diligence and acted when they learned of Petitioners' involvement.

Petitioners identify no confusion amongst the lower courts in either applying the accrual rule or equitable tolling that would justify this Court's intervention. In fact, counsel's concession on the latter point should end the inquiry. At worst, this case presents a question of "the misapplication of a properly stated rule of law," which should not justify certiorari or summary reversal. S. Ct. R. 10. But Petitioners fail to even argue that the Ninth Circuit misapplied the doctrine of equitable tolling.

The Ninth Circuit panel had before it ample allegations to invoke equitable tolling. Equating Respondents' efforts to the "investigative approach" "used by drug enforcement agents," the panel observed that Respondents had filed multiple (actually hundreds of) claims against parties engaged in counterfeiting, collaborated with Spanish law enforcement officers to try to thwart the hackers, and hosted seminars to draw attention to the problems of piracy. Pet. App. 3a. Respondents also worked with others to share information about hackers and possible countermeasures, all in an effort to

learn what Respondents eventually did learn, but not until 2002. *Id.* When juxtaposed with Petitioners' efforts at concealing their activities – including the use of "code names," preventing participants from disclosing their knowledge about the scheme, and working with known hackers – this case is a model one for applying equitable tolling.

Finally, reviewing this issue would require this Court to trespass into state law realms with no federal constitutional or other connection to federal law or policy. The complaint presents state law causes of action for intentional interference with contract and tortious interference with prospective economic advantage. Petitioners invite this Court to rule that the Ninth Circuit misapplied California law of equitable tolling to toll the statutes of limitations on those state law claims. No federal question is implicated with respect to these two counts.

The statute of limitations issue raised by Petitioners does not warrant certiorari, much less the summary reversal invited by Petitioners.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari and the request for summary reversal should be denied.

Respectfully submitted,

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